IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| UNITED STATES OF AMERICA | : | CRIMINAL ACTION |
| | : | |
| v. | : | |
| | : | |
| CARMEN GRICCO | : | NO. 01-90 |

**MEMORANDUM**

**Padova, J.** **March , 2002**

Before the Court is Defendant Carmen Gricco's Motion to Suppress Physical Evidence. Hearings were held before the Court on January 14 and 28, 2002, and February 6, 2002. For the following reasons, the Court denies the Motion.

## I. BACKGROUND

Defendant is charged with various drug, money laundering, and weapons offenses in connection with an alleged conspiracy to manufacture and distribute methamphetamine. The 17-count Superseding Indictment charges Defendant with the following: 1 count of conspiracy to manufacture and distribute methamphetamine; 1 count of manufacture and attempted manufacture of methamphetamine; 1 count of possession of methylamine; 1 count of money laundering conspiracy; 9 counts of money laundering; 1 count of possession of firearms by a convicted felon; 1 count of using a firearm during and in relation to a drug trafficking

crime; 1 count of using a semiautomatic assault weapon during and in relation to drug trafficking crime; and 1 count possession of a machine gun.

**II. DISCUSSION**

Defendant seeks to suppress all evidence – including controlled substances, various weapons, chemicals, liquor, documents and records, keys and other items – found during four separate searches.[1] On December 18, 2000, pursuant to warrants,[2] searches were conducted at three locations: (1) 132 Chester Pike (Defendant's residence, titled in his wife's name); (2) 218 West Hinckley Avenue (Defendant's mother-in-law's home); and (3) 933 Penn Street (Defendant's business, a boat operating as the bar/nightclub "Treasure Island"). On December 20, 2000, a "warrantless" search[3] of a metal storage trunk located in the

[1]Defendant's original Motion also sought to suppress evidence seized during a search that was conducted at 112 Ladomus Circle, his former residence. At the suppression hearing, defense counsel conceded that Defendant lacked standing to challenge this search. (N.T. 1/14/02 at 14, 19.) Accordingly, the Motion to Suppress no longer challenges that search.

[2]The warrants were issued by Magistrate Judge Thomas Reuter on December 15, 2000.

[3]Although Defendant characterizes the search as warrantless, for the reasons explained below, the Court concludes that the search was a continuation of the prior search of the basement at 218 West Hinckley Avenue, which was conducted pursuant to a valid warrant.

basement of 218 West Hinckley Avenue was conducted.[4] Defendant asserts that the probable cause for the issuance of the warrants was lacking because the affidavit on its face was inadequate to establish probable cause, the information in the affidavit upon which probable cause was based was stale, and the affidavit was knowingly or recklessly false. Defendant asserts that the search of the metal storage trunk was unlawful because: (1) it was conducted pursuant to consent by Defendant's mother-in-law, who had no authority to consent to the search; (2) no warrant was issued; (3) no exceptions to the search warrant requirement existed; and (4) no probable cause existed.

A. Standing

At the threshold, the Government challenges Defendant's standing[5] to contest the subject searches. The Court concludes

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[4]The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

[5]The Government argues that Defendant, by his own averments, has previously denied the existence of any reasonable expectation of privacy in some of the places searched and the items seized. Specifically, the Government contends that Defendant originally

that Defendant has standing to contest all of the searches challenged in his motion.

A defendant may urge suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that his Fourth Amendment rights were violated by the challenged search or seizure. See United States v. Padilla, 508 U.S. 77, 81 (1993). The defendant must establish that he possessed a reasonable expectation of privacy in the areas searched or the items seized. See Rakas v. Illinois, 439 U.S. 128, 130 n.1 (1978); United States v. Baker, 221 F.3d 438, 441 (3d Cir. 2000). "[T]he capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." Mancusi v. DeForte, 392 U.S. 364, 368 (1968) (citing Katz v. United States, 389 U.S. 347, 352 (1967)). The Court must determine whether a reasonable expectation of privacy exists under the particular

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claimed in his Motion to Dismiss the Indictment that he had no control over or interest in the metal storage trunk, the locked room in the basement of his mother-in-law's house, or the items in the basement of his residence, but that he now asserts that he did indeed have an expectation of privacy in these subject places and items. The Court will not decide the extent of Defendant's expectation of privacy based on counsel's statements in the prior pleadings; rather, it will analyze the issue under the applicable legal standards.

facts and the totality of circumstances. See Minnesota v. Olson, 495 U.S. 91, 97-99 (1990).

Defendant had a reasonable expectation of privacy in his home, 132 Chester Pike, and therefore can contest the search conducted there. See United States v. Paige, 136 F.3d 1012, 1018 (5th Cir. 1998) (quoting United States v. York, 895 F.2d 1026, 1029 (5th Cir. 1990)) ("Generally speaking, the 'right to privacy in the home is certainly a reasonable expectation.'"). Similarly, Defendant has a reasonable expectation of privacy at 933 Penn St., his office. See Mancusi v. DeForte, 392 U.S. 364, 369 (1968) ("[O]ne has standing to object to a search of his office, as well as of his home.")

Defendant has also demonstrated a reasonable expectation of privacy in the locked room in the basement at 218 West Hinckley Avenue. A reasonable expectation of privacy exists in circumstances where an individual maintains the only key to an area, maintains exclusive control over the area and keeps personal and/or business items there. See United States v. Chaves, 169 F.3d 687, 690-91 (11th Cir. 1999) (finding that defendant had an expectation of privacy where he had the only key to a warehouse, giving him a measure of control and the ability to exclude others, and where he kept personal and business papers

there) (citing Rakas v. Illinois, 439 U.S. 128, 149 (1978) and United States v. Baron-Mantilla, 743 F.2d 868, 870 (11th Cir. 1984)), cert. denied, 528 U.S. 1048 (1999). According to the testimony of Mrs. Maggi, Defendant's mother-in-law, Defendant had sole control and access to the locked room in her basement, where the search pursuant to warrant was conducted.[6] Therefore, Defendant had a reasonable expectation of privacy in this room. Defendant also had a reasonable expectation of privacy in his metal storage trunk,[7] as he locked the trunk and was the only person who had a key to it.[8] Defendant had a reasonable expectation of privacy in the metal storage trunk. See United States v. Chaves, 169 F.3d at 691.

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[6]Defendant received sole access and control to this locked room when he and his wife temporarily moved into Mrs. Maggi's house. At that time, Defendant asked Mrs. Maggi if he could store boxes and papers from his previous business in the room and if he could lock the room so that the items would be safe and his children would not get into them. Mrs. Maggi agreed, and Defendant maintained the only key to the room and was the only one who had access to the room. According to Mrs. Maggi's testimony, after Defendant and his wife moved out, Defendant still maintained sole access to and control of this room.

[7]The trunk was located in an open area of Mrs. Maggi's basement where Defendant was storing it.

[8]At the suppression hearing, the Government conceded that Defendant had standing to challenge the search of the trunk. (N.T. 1/14/02 at 114.)

Defendant has established a reasonable expectation of privacy in his home, business, the basement of his mother-in-law's home, and the metal storage trunk and, therefore, has standing to challenge the validity of the searches.

B. Validity of the Warrants

Defendant challenges the validity of the searches conducted pursuant to the warrants issued by Magistrate Judge Thomas J. Rueter. Judge Rueter approved the warrants to search the three subject locations based on the affidavit of Thomas Hodnett ("Agent Hodnett"), a special agent with the Drug Enforcement Agency ("DEA"). The affidavit asserts Agent Hodnett's belief that clandestine methamphetamine laboratories and operations were being conducted out of the locations to be searched or that items relating to methamphetamine production and trafficking, including drugs, laboratory equipment, records, and guns would be found at the locations, and states facts in support of this theory.

To determine the validity of the warrant issued on the basis of the affidavit, the Court first examines whether the affidavit, as stated, establishes probable cause. See United States v. Williams, 3 F.3d 69, 74 (3d Cir. 1993). If the Court determines that the affidavit did establish probable cause, the inquiry turns to whether the warrant was issued in reliance on a

knowingly or recklessly false affidavit. See United States v. Atiyeh, Crim.Act.00-682, 2001 U.S. Dist. LEXIS 1837, at *7, 17-18 (E.D. Pa. Jan. 22, 2001). Defendant challenges the validity of the warrants both with respect to sufficiency to establish probable cause and with respect to reliance on an allegedly knowingly or recklessly false affidavit.

1. Probable Cause

Probable cause is determined under the totality of circumstances and exists if, "given all the circumstances set forth in the affidavit . . . including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). Probable cause may be based on a police officer's observations or experience, United States v. Jenkins, 901 F. 2d 1075, 1080-81 (11th Cir. 1990), or information from a reliable, known informant or information from an independent source that can be independently corroborated. United States v. Stiver, 9 F.3d 298, 300-01 (3d Cir. 1993).

The court's review of the magistrate judge's initial probable cause determination is deferential. See United States v. Whitner, 219 F.3d 289, 296 (3d Cir. 2000). The court accords

great deference, reviewing only for "substantial basis" to issue a search warrant. See United States v. Loy, 191 F.3d 360, 365 (3d Cir. 1999). The court focuses on what information is "actually contained in the affidavit, not on what information an affidavit does not include." Id. (citing United State v. Conley, 4 F.3d 1200, 1208 (3d Cir. 1993)). The Court must confine itself "'to the facts that were before the magistrate judge, i.e., the affidavit and [does] not consider information from other portions of the record.'" United States v. Hodge, 246 F.3d 301, 305 (3d Cir. 2001) (citation omitted). Doubtful or marginal cases should be resolved in favor of the warrant. See Atiyeh, 2001 U.S. Dist. LEXIS 1837, at *8 (citing United States v. Ventresca, 380 U.S. 102, 109 (1965)). The affidavit must be read in its entirety and in a common sense and nontechnical manner. See Illinois v. Gates, 462 U.S. at 230-31.

Examining the information provided in the affidavit, the Court is satisfied that the Magistrate Judge had a substantial basis for determining that there was probable cause to issue the warrants to search the subject locations. The facts set forth in the affidavit were based on information provided by seven (7) cooperating witnesses, an analysis of toll records, and information gathered through the execution of two federal search

warrants and investigation by law enforcement officers, including those with specific experience in methamphetamine investigations, during an investigation that began in November 1998. (Affidavit ¶¶ 5, 7.) The information included descriptions and details from cooperating witnesses regarding operations to manufacture and distribute methamphetamines. (See, e.g., id. ¶¶ 12b, 12c, 14, 15, 16, 17.) The statements connected the Defendant to the alleged methamphetamine manufacturing and distribution activities. (See, e.g., id. ¶¶ 14a-17e, 18a-d.) The information included testimony as to deliveries to Defendant's home at 112 Ladomus Circle of chemicals used in the production of methamphetamines. (See, e.g., id. ¶¶ 17f, 18c.) The affidavit contained specific information regarding Defendant's use of the basement of 218 West Hinckley Avenue to store materials related to the operation, including chemicals and weapons. (Id. ¶ 14i.) The affidavit also included several statements by cooperating witnesses linking the activities of Defendant's operation to other locations covered by the warrant.[9] (See, e.g., id. ¶¶ 17e,

[9]The Court in particular notes that it is satisfied that the Magistrate Judge had sufficient basis to determine that there was probable cause that materials being searched for would be found at Defendant's home at 132 Chester Pike. There was extensive information regarding Defendant's general use of his prior home and business in the course of his operations, and regarding the ongoing nature of the alleged conspiracy. The affiant agent in the affidavit also noted, based on his experience as an investigator of

17f, 17h-17n.) The affidavit notes that the reliability of the sources of information as well as many of the specific facts recited in the affidavit are corroborated by statements of other witnesses or information gathered by investigators. (See, e.g., id. ¶¶ 14a, 15a, 17a, 18a, 19a.)

Defendant next asserts that probable cause was lacking because it was based on stale information.[10] The warrants were issued on December 15, 2000. Defendant contends that the probable cause related to facts that pre-dated July 1, 1999. Specifically, Defendant argues that the alleged probable cause included no basis on which to conclude that the items sought would still be found in the locations to be searched.

The age of the information supporting a warrant application is a factor that must be considered in determining probable cause. See United States v. Williams, 124 F.3d 411, 420 (3d Cir. 1997) (citing United States v. Harvey, 2 F.3d 1318, 1322 (3d Cir.

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these types of drug operations, that: "Persons involved in large scale drug trafficking conceal in their residences and business caches of drugs, large amounts of currency, financial instruments, . . . and proceeds of drug transactions, and evidence of financial transactions . . . derived from drug trafficking activities. . . ." (Affidavit ¶ 6d.)

[10]At the suppression hearings, Defendant conceded that the information upon which probable cause was based is not stale as to Defendant's business at 933 Penn Place. (N.T. 1/28/02 at 67.) Therefore, the Court's discussion of staleness relates only to the probable cause for searches at the other relevant properties.

1993)). But age alone does not determine staleness. See id. Moreover, the timeliness of probable cause has no fixed formula. Timeliness depends on all of the facts of a case, including the type of case (chance encounter in the night or regenerating conspiracy), whether the evidence is of a nature to still be held in the place to be searched (perishable and easily transferable or of enduring utility to its holder) and whether there is probable cause to believe it is still there, including whether the place to be searched is a mere criminal forum of convenience or a secure operational base. See United States v. Andresen, 427 U.S. 463, 478 (1976). Moreover, when an activity is protracted and continuous in nature, staleness is less of a concern, and courts have upheld probable cause based on information that is months and years old. See United States v. Tehfe, 722 F.2d 1114, 1190 (3d Cir. 1983) ("When an activity is of a protracted and continuous nature 'the passage of time becomes less significant.'") (citing United States v. Harris, 482 F.2d 1115, 1119 (3d Cir. 1973)). In particular, staleness is less significant in large-scale drug cases. Id. ("[P]rotracted and continuous activity is inherent in a large scale narcotics operation."); see also United States v. Rhymes, 206 F.3d 349, 374-76 (4th Cir. 1999) (finding two-year-old information not

stale with respect to a long-term drug trafficking and money-laundering operation), cert. denied, 530 U.S. 1222 (2000); United States v. Greany, 929 F.2d 523, 525 (9th Cir. 1991) (finding two-year-old information relating to marijuana operation not stale); United States v. Rowell, 903 F.2d 899, 903 (2d Cir. 1990) (finding 18-month-old information reliable because evidence related to a continuous drug distribution business and conspiracy); United States v. LaMorte, 744 F. Supp. 573, 575 (S.D.N.Y. 1990) (holding three and one-half years not too distant where a massive drug smuggling enterprise was ongoing for years).

In this case, the information in the affidavit serving as a basis for probable cause was not stale. The information related to a methamphetamine manufacturing and distribution operation that, according to cooperating witnesses cited in the affidavit, had been ongoing for a number of years. (Affidavit ¶ 14d.) The information established that Defendant had been supplying methamphetamine dating back to at least 1996. (Id. ¶¶ 17b-c.) This methamphetamine was sold to third parties. (Id. ¶¶ 14b-d.) The affidavit contained information regarding the sale and supply of P-2-P, a chemical used in manufacturing methamphetamine, (Id. ¶¶ 12b-d, 14j, 17j, 20a), and with respect to the delivery of P-2-P to Defendant's home at 112 Ladomus Circle in 1998. (Id. ¶

17f, 18c.) According to the witness testimony, Defendant stored chemicals, P-2-P, containers, guns, scales and records in a locked room in the basement of 218 West Hinckley Avenue in 1997, and Defendant went to the room to obtain chemicals used in the manufacture of methamphetamine. (Id. ¶ 17i.) This witness also stated that Defendant was meticulous and kept a record of everything. (Id. ¶ 17n.) The special agent of the IRS advised in the affidavit that drug traffickers typically keep and maintain records and assets relating to drug proceeds in their residences and at relative's residences and maintain such records for long periods of time, even after illegal activity may cease. (Id. ¶ 24.) The affiant himself, an experienced special agent of the DEA, also stated that methamphetamine distributors often maintain records pertaining to drug sales and conceal in their residences, businesses and other secure locations including, safes within their residence and/or business, drugs, money, jewelry, and other items. (Id. ¶ 6.) Given the longevity of the alleged scheme and the experienced agents' testimony regarding the likely maintenance of records of the operation, as well as the statements by cooperating witnesses as to the existence and maintenance of such records as well as details of the operation,

the period prior to entry of the warrant was not sufficiently lengthy to render the information stale.

Defendant further argues that the information was stale because it consisted almost entirely of the statements of cooperating witness Steve DeMarco, who was arrested on July 1, 1999 and had no contact with Defendant thereafter. However, Defendant is factually incorrect. DeMarco and Defendant did have contact after DeMarco's arrest on July 1, 1999 and prior to the issuance of the warrant. The affidavit supporting the search warrant application indicates that DeMarco, while incarcerated, made four telephone calls to Defendant. (Affidavit ¶ 20a.) On November 16, 2000, DeMarco sent a letter to Defendant to which Defendant responded by letter postmarked November 28, 2000.[11] In light of this continuing conduct, the information did not become stale. See, e.g., United States v. Harris, 20 F.3d 445, 450-51 (11th Cir. 1994). Moreover, even if the information were stale, "stale information is not fatal if the government affidavit updates, substantiates, or corroborates the stale material." Id. at 450. The affidavit included information provided by six additional cooperating witnesses regarding various aspects of the

[11]According to the affidavit, this letter correspondence discussed, in coded language, an arrangement for supplying P-2-P for methamphetamine production. (Affidavit ¶ 17s.)

methamphetamine operation. (Affidavit ¶¶ 14a, 15a, 17a, 18a, 19). Investigators also obtained additional corroborating evidence and surveillance through investigation conducted over more than two years. (Id. ¶¶ 17s, 22, 23.) The Court is satisfied that the material provided by DeMarco was sufficiently corroborated for purposes of determining probable cause.

Additionally, the Court notes that the search warrants for 132 Chester Pike and 218 West Hinckley Avenue listed numerous business record-related materials to be searched and seized. In this case, the information relating to the existence of such business records was certainly not stale. "[I]t is reasonable to infer that a person involved in drug dealing on such a scale would store evidence of that dealing at his home. United States v. Hodge, 246 F.3d 301, 306 (3d Cir. 2001) (citing United States v. Whitner, 219 F.3d 289, 296-98 (3d Cir. 2000)) (noting that an experienced officer believed defendant's home would likely contain evidence related to defendant's drug activities and that the magistrate judge was entitled to give considerable weight to the conclusions of the experienced officer regarding where evidence of a crime would likely be found.) The information regarding the alleged conspiracy established that it had been ongoing for some time and that Defendant kept records of the

transactions. Furthermore, it is reasonable to conclude that the cooperating witnesses's statement regarding the locked room in Mrs. Maggi's basement also was not stale because "it is likely that the use of such a permanent and specialized feature would continue for a lengthy period." United States v. Williams, 124 F.3d 411, 421 (3d Cir. 1997) (finding an informant's information about a secret room in a basement also provided support for a probable cause finding since it is likely the use of the room would continue). Accordingly, the probable cause determination was not based on stale information.

2. Knowingly or Recklessly False Affidavit

The Court next addresses Defendant's contention that the affiant knowingly or recklessly withheld material information from the magistrate judge and presented false information to the magistrate judge. Defendant seeks a Franks hearing to examine the validity of the warrant in light of his allegations. See Franks v. Delaware, 438 U.S. 154, 156 (1978). The Court determines that Defendant has failed to establish sufficient basis for conducting a Franks hearing, and denies the Motion.

In Franks v. Delaware, the United States Supreme Court held that evidence seized pursuant to a warrant must be suppressed if the affidavit upon which the warrant was based contained material

information the affiant knew was false, or the veracity of which he recklessly disregarded. 438 U.S. 154, 156 (1978). To be accorded a Franks hearing, a defendant must first make a "substantial preliminary showing" that the affiant made a knowingly and intentionally false statement in the affidavit and that this false statement was necessary to the determination of probable cause. See id.; United States v. Brown, 3 F.3d 673, 676 (3d Cir.), cert. denied, 510 U.S. 1017 (1993). The defendant's showing must be supported by more than conclusory allegations, however:

> There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Franks, 438 U.S. at 171. If a defendant meets these requirements, a hearing is only granted if, when the material in question is set to one side, the remaining content is insufficient to support a finding of probable cause.[12] Id. at

[12]If a hearing is granted, the defendant must establish, by a preponderance of the evidence, that the information is knowingly and intentionally false, and that the remainder of the affidavit, excluding consideration of the false material, is insufficient to establish probable cause. Franks, 438 U.S. at 155-56. The search

171-72. If the affidavit would be sufficient even absent the allegedly false information, a hearing is denied. Id.

The Court concludes that Defendant has failed to make a substantial preliminary showing sufficient to warrant a Franks hearing. Defendant does specifically allege that the affiant was deliberate or reckless because he knew of the additional information and intentionally left it out of the affidavit. Defendant has also supplied documentation to support the existence of allegations not included in the affidavit.[13] For example, Defendant disputes the veracity of DeMarco's allegations regarding the modus operandi for the methamphetamine production (Def.'s Supp. Mem. at 3), the actual source of P-2-P delivered and allegedly used by Defendant in the production of methamphetamine (Id.), DeMarco's supposed co-ownership of the club Treasure Island (Id. at 5), and the ownership of the 1982 Corvette. (Id. at 8.)

The focus of the inquiry, however, must be on the deliberateness or recklessness of the affiant, and not of any

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warrant must then be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. Id.

[13]By way of proffer, Defendant indicates that at a Franks hearing, he would also present the cross-examination of the affiant Agent, with the aim of proving that the affiant intentionally or recklessly included false information in the affidavit.

nongovernmental informant. Franks, 438 U.S. at 171. Defendant alleges that the affiant knew of all of the inconsistencies and inaccuracies, but intentionally included DeMarco's testimony and left out that which contradicted it.[14] Defendant, however, has not provided any evidence linking these inconsistencies with a deliberate or reckless action by the affiant. The fact that there may have been factual inconsistencies among the stories of multiple cooperating witnesses does not, without more, establish the inherent falsity of the version of events provided by a particular witness or that the affiant made a deliberately or recklessly false statement. The only additional evidence Defendant proposes to present is affiant's cross-examination testimony at a Franks hearing. (N.T. 2/6/02 at 29-31.)

Defendant also challenges the affiant's description of (and reliance on) DeMarco as "reliable and credible." (Id. at 4.) The Court observes that this aspect of the motion appears, in fact, to challenge the veracity of DeMarco as a witness rather

[14]Defendant presupposes that the information provided by the other witnesses was truthful to the exclusion of the version of events provided by DeMarco. Defendant provides or proffers no evidence suggesting that the affiant did not consider but also reject some of the conflicting testimony, and in fact admits that such evidence could only come from affiant himself upon cross-examination. The Court also notes that not all of the inconsistencies pointed to by Defendant necessarily foreclose the veracity of some of the statements made by DeMarco.

than the veracity of the affiant himself. See Brown, 3 F.3d at 677. Nonetheless, to the extent this allegation focuses properly on the affiant, the Court concludes that Defendant has failed to establish the necessity of a Franks hearing on this basis. Although Defendant points to numerous specific instances in which he claims DeMarco's version of events was not accurate, he presents no particular evidence to indicate that affiant did not believe DeMarco to be a reliable and credible witness as stated in the affidavit. The Court does not find the inaccuracies pointed to by Defendant to be sufficient to infer that DeMarco was necessarily unreliable, let alone that the affiant must have known that DeMarco was unreliable at the time of preparation of the affidavit.

However, the Court further concludes that, even if Defendant had made a sufficient preliminary showing of deliberate falsehood or reckless disregard for the truth on the part of the affiant, a Franks hearing is not warranted because the remainder of the affidavit, excluding consideration of the allegedly false information and including the allegedly omitted information, constitutes sufficient basis for probable cause to issue the warrants. The particular inconsistencies in dispute – relating to specific methods of operation of the scheme, precise title

ownership of certain property, and use of proceeds from the sale of drugs – are all facts related to the alleged scheme but not critical to the issuance of the warrants. Excluding the information questioned by Defendant, there was substantial information relating to the existence of a methamphetamine manufacturing and distribution scheme, of Defendant's connection to it, and of the existence of paraphernalia, records, and weapons so as to justify the Magistrate Judge's finding of probable cause to issue the warrants. This information came from six other cooperating witnesses, as well as information gathered during the course of an investigation that had begun more than two years prior to the issuance of the warrant. As it is clear that the affidavit would have been sufficient to support a probable cause finding even in the absence of the information questioned by Defendant, a Franks hearing is not required. See Franks, 438 U.S. at 172.

C. Warrantless Search: Metal Storage Trunk

Defendant also challenges the search of his metal storage trunk. On December 18, 2000, a search pursuant to warrant was conducted in the locked room in the basement of Mrs. Maggi's home.[15] During that search, officers and agents found chemicals

[15]The following recitation of facts comes from the testimony of Gregory J. Auld, Special Agent of the Federal Bureau of

and equipment used in methamphetamine laboratory production. Subsequent to the initial search, Agent Auld received a telephone call from Mrs. Maggi's son, who asked the Agent to return to 218 West Hinckley Avenue and remove a metal storage trunk that he and Mrs. Maggi had found in the basement, and which contained guns and ammunition. Agent Auld was unable to return to Mrs. Maggi's home that day, but arrived the following day.[16] Mrs. Maggi's son and another son-in-law were present when Agent Auld returned. Mrs. Maggi was home, but remained upstairs. They told Agent Auld that they had been cleaning the basement after the December 18, 2000 search when they found Defendant's metal storage trunk. Mrs. Maggi, her son, and her son-in-law attempted to remove the trunk from the basement, but the trunk was too heavy to move. The son-in-law broke the lock off of the trunk. At that time, both Mrs. Maggi and the son-in-law saw contraband, consisting of numerous guns and ammunition in the trunk. Mrs. Maggi asked her

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Investigation ("FBI"). Agent Auld, was one of the agents present during the initial search of 218 West Hinckley Avenue. He also returned to the residence on December 20, 2000, and searched and inventoried the trunk. Agent Auld testified at the suppression motion hearing. (N.T. 1/14/02 at 95-113.)

[16]The agent did not recall the exact date of the phone call and his subsequent return to the Maggi home. From the record, it is unclear whether the agent received the call on December 18 or December 19, 2001. Accordingly, Defendant either returned to the Maggi home on December 19 or 20, 2001.

son-in-law to close the trunk right away. The lid was placed closed on the trunk, but it was not re-locked. Agent Auld opened the unlocked lid, saw numerous guns on top of the entire contents of the trunk and determined that, for safety reasons, he would not move the footlocker without determining whether the guns were loaded or unloaded. He examined all of the items within the trunk, which included guns, bullets, silencers, a card which appeared to have a recipe on it for manufacturing methamphetamine, jewelry, registration slips for weapons in the name of George Wagner, and an unknown powder that was like a gel of some sort. The contents in the footlocker were inventoried and re-packaged back into the metal storage trunk. With help, the FBI Agent carried it away from Mrs. Maggi's home, to his office and turned it over to Special Agent Hodnett from the DEA. The agent had Mrs. Maggi complete a consent to search form.

Defendant argues that the search of the trunk was invalid because Mrs. Maggi did not have authority to consent to the search.[17] The Court concludes, however, that the search was

[17]Defendant argues that the Agent had Mrs. Maggi sign a consent form and that therefore the agent believed that Mrs. Maggi had authority to consent, accordingly, and this was a search pursuant to invalid consent. The FBI Agent's belief that consent was valid, however, is immaterial. Cf. Whren v. United States, 517 U.S. 806, 810-13 (1996)(holding that the subjective thoughts or intentions of a law enforcement officer in conducting a search are irrelevant).

valid on two independent grounds: (1) the search was a continuation of the initial search pursuant to warrant; and (2) the search was legal under the private search doctrine. Because the Court finds that these independent grounds deem the search valid, it need not address the issue of consent.[18]

A warrantless search of a premises is constitutional if the search is a continuation of an initial search conducted pursuant to warrant, so long as probable cause continues to exist and the government does not act in bad faith. United States v. Gerber, 994 F.2d 1556, 1558-59 (11th Cir. 1993) (holding that a second search of automobile two days after first search, because of a delay caused by inability to open hood of car was continuation of first search pursuant to same warrant)(citations omitted). See

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[18]The Court observes that Mrs. Maggi may have had the authority to consent to the search because Defendant made her an unwitting custodian of the trunk. See United States v. Diggs, 544 F.2d 116 (3d Cir. 1976) (holding that an unwitting custodian who owned the real property where the search occurred had authority to consent to a search, particularly to exonerate themselves from any involvement in the crime when the defendant left a box containing stolen money with them for safekeeping).

In addition, the Court need not analyze the validity of the search under the plain view exception, although the Court believes that the search is valid under that doctrine as well. See, e.g., United States v. Paige, 136 F.3d 1012, 1023-1024 (5th Cir. 1998); United States v. Martin, No.90-6318, 1991 U.S. App. LEXIS 19740, at *10 (6th Cir. 1991 Aug. 19, 1991)("If the container is in plain view, and the police have probable cause to believe that it contains contraband, the search or seizure is constitutionally acceptable."); United States v. Jones, Crim.A.No.00-242, 2000 U.S. Dist. LEXIS 17921, at *15-17 (E.D. Pa. Dec. 14, 2000).

also United States v. Kaplan, 895 F.2d 618, 623 (9th Cir. 1990) (holding that second search of office pursuant to same warrant was continuation of first search when second search took place two hours after first and was conducted for the purpose of retrieving files named in the warrant but not given to the officer during first search); United States v. Soriono, 482 F.2d 469, 476 (5th Cir. 1973) (holding that subsequent intrusions close in time and similar in nature are not illegal if they do not "significantly increase a pre-existing, legitimate interference with a protected interest."); United States v. Huselage, 480 F. Supp. 870, 874-76 (W.D. Pa. 1979) (holding that second entry into automobile, pursuant to warrant, was continuation of first).

Defendant argues that the search of the trunk could not have been a continuation because the initial search of Mrs. Maggi's basement included only the locked storage room that was searched and not the entire basement.[19] However, the search warrant is

[19]Defendant argues that if the Court considers the warrant to include "the basement," then the affidavit supporting the warrant application lacks probable cause because the affidavit refers to the locked room in the basement, not the entire basement. The affidavit refers to the locked room in the basement. Even if the warrant were to be held only to the locked room, however, the agent's reliance on the face of the warrant which states "the basement" on the warrant would be reasonable under the good faith exception. See United States v. Leon, 468 U.S. 897, 913 (1984) (establishing that evidence need not be suppressed when law

specific in specifying that the premises subject to search under the warrant was the "basement of 218 West Hinckley Avenue." The warrant listed the items that were seized during the search of the trunk – firearms, jewelry, and items used in the manufacture of illegal controlled substances. The search warrant also specified that the search was to be performed on or before December 25, 2000. The search of the trunk took place within two days after the initial search of Mrs. Maggi's basement, at the earliest time the agent could return, and prior to the warrant's

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enforcement agents obtain evidence through objective good faith reliance on facially valid search warrants that are later found to lack probable cause). The good faith exception applies if "a reasonably well trained officer would have known that the search was illegal despite the magistrate [judge's] authorization. United States v. Hodge, 246 F.3d 301, 307 (3d Cir. 2001) (citations omitted). "The mere existence of a warrant typically suffices to prove that an officer conducted a search in good faith and justifies application of the good faith exception." Id. (citing Leon, 468 U.S. at 922). Four situations preclude the good faith exception: (1) when the magistrate judge issued the warrant in reliance on a deliberately or reckless false affidavit; (2) when the magistrate judge abandoned his judicial role and failed to perform his neutral and detached function; (3) when the warrant was based on an affidavit so lacking in indicia or probable cause as to render official belief in its existence entirely unreasonable; or (4) when the warrant was so facially deficient that it failed to particularize the place to be searched or the things to be seized. Id. at 308 (citing Williams, 3 F.3d at 74 n.4). None of the four exceptions apply here. The Court finds that the affidavit was not deliberately or reckless false and the affidavit provided probable cause. The neutrality of the magistrate judge is not at issue here and is assumed. Finally, the warrant was not facially deficient, as it particularized that the search would be confined to Mrs. Maggi's basement, not her entire house, and listed with particularity the items to be seized.

expiration date. The subsequent search was therefore performed under a valid warrant of an item taken from the area covered by the warrant, and involved a seizure of items that were specifically listed in the warrant. The search also occurred as a result of Mrs. Maggi calling back the agents shortly after the initial search was conducted, and was conducted as soon as they were able to return, within two days of the initial search. Given all of these circumstances, the Court concludes that the search of the trunk was a continuation of the initial search pursuant to a valid warrant and, was therefore, lawful.

Furthermore, even if the search of the trunk was not a continuation of the prior search, the Court concludes that the search was valid under the private search doctrine articulated by the United States Supreme Court in United States v. Jacobsen, 466 U.S. 109 (1984). Under this doctrine, where an initial search is conducted by a private party, a subsequent invasion of privacy by a government agent must be tested by the degree to which the agent exceeded the scope of the private search. Id. at 115 (citing Walter v. United States, 447 U.S. 649 (1980)). In Jacobsen, two Federal Express employees examined a damaged, torn package that was wrapped in brown paper over a cardboard box. Pursuant to company policy, they opened the package to examine

its contents for insurance claim purposes. The employees found a tube made of duct tape. The employees cut open the tube and found four zip-lock plastic bags, the outermost enclosing the other three and the innermost containing white powder. The employees then notified the DEA. Before the DEA agent arrived, the employees returned the plastic bags to the tube and put the tube and the newspapers back into the cardboard box. Id. at 111. The DEA agent saw that one end of the tube had been slit open; he removed the four plastic bags from the tube and saw the white powder. He then opened each of the four bags and removed a trace of the white substance with a knife blade. His field test that was performed on the spot identified the substance as cocaine. Id. at 111-12. The Supreme Court determined that the search was valid, because the agent's actions in removing the plastic bags from the tube and visually inspecting their contents allowed the agent to learn nothing that had not already been learned during the private search. Id. at 120.

The federal jurisprudence setting forth what types of activities constitute "exceeding the scope" of a private search is sparse. Several Circuit Courts have held that the police exceed the scope of the prior private search if they examine objects or containers that the private searchers did not examine.

United States v. Runyan, No.01-10821, No. 01-11207, 2001 U.S. App. LEXIS 26310, at *28 (5th Cir. Dec. 10, 2001); United States v. Rouse, 148 F.3d 1040, 1041 (8th Cir. 1998); United States v. Kinney, 953 F.2d 863, 866 (4th Cir. 1992); United States v. Donnes, 947 F.2d 1430, 1434 (10th Cir. 1991). Fewer courts have addressed whether police exceed the scope of a private search when they examine the same materials as private searchers, but in a more thorough or different manner. In Runyan, the Fifth Circuit set forth the following rule: "In the context of a closed container search, [p]olice do not exceed the private search when they examine more items within a closed container than did the private searchers." Runyan, 2001 U.S. App. LEXIS 26310, at *42 (finding the government did not exceed the scope of the private search when the government took more time and were more thorough in searching a box of pornographic videos and magazines) (citing United States v. Simpson, 904 F.2d 607, 610 (11th Cir. 1990)). The Court reasoned as follows:

> Though the Supreme Court has long recognized that individuals have an expectation of privacy in closed containers, . . . an individual's expectation of privacy in the contents of a container has already been compromised if that container was opened and examined by private searchers, . . . Thus, the police do not engage in a new 'search' for Fourth Amendment purposes each time they examine a particular item found within the

> container. . . . Otherwise, "police would exceed the scope of a private investigation and commit a warrantless 'search' in violation of the Fourth Amendment each time they happened to find an item within a container that the private searchers did not happen to find. Police would thus be disinclined to examine even containers that had already been opened and examined by private parties for fear of coming across important evidence that the private searchers did not happen to see and that would then be subject to suppression."

Id. at *40-42 (citations omitted). This Court agrees with and adopts the reasoning and rule of Runyon. Requiring the police to examine only the same items in the closed container as the private searcher would "over-deter the police, preventing them from engaging in lawful investigation of containers where any reasonable expectation of privacy has already been eroded."[20] Id. at *42; but see Rouse, 148 F.3d at 1041 (holding invalid search where the police examined more items within an airline passenger's bag than did airline personnel).

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[20]Moreover, to the extent the investigators may have exceeded the scope of the original private search to examine items other than guns and ammunition in the already opened trunk, the searches were valid under the plain view doctrine. United States v. Walsh, 791 F.2d 811, 815 (10th Cir. 1986) (holding search valid where agent merely repeated the private search and inspected what was in plain view). Additionally, the examination of the full contents of the trunk was likely valid for safety reasons given Mrs. Maggi's request that Agents move the trunk, particularly in light of the knowledge that, at a minimum, the trunk contained firearms. See United States v. Chadwick, 433 U.S. 1, 15 (1977).

In this case, Mrs. Maggi and her son-in-law opened the locked trunk, saw guns and then closed the trunk. The FBI Agent opened the trunk and examined all of the items within the trunk. The Agent checked the guns to see if they were loaded and unloaded any that were to make them safe for removal. The contents of the trunk were inventoried and re-packaged back into the metal storage trunk. With assistance, the FBI Agent carried the trunk out of Mrs. Maggi's home, brought it to his office and turned it over to a DEA Agent. Although the agent's examination of the items in the container was certainly closer and more careful than the quick examination by Mrs. Maggi and her son-in-law, his search did not exceed the scope of the private search conducted by Mrs. Maggi and her son-in-law in which they opened the locked trunk and took notice of its contents. The Court concludes that, under the private search doctrine as articulated in Runyon, the FBI Agent's search was valid.

**III. Conclusion**

For all of the reasons stated above, Defendant's Motion to Suppress evidence is denied. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| UNITED STATES | ) | |
| | ) | Criminal Action |
| v. | ) | |
| | ) | No. 01-90 |
| CARMEN GRICCO | ) | |

**ORDER**

**AND NOW,** this day of March, 2002, upon consideration of Defendant Carmen Gricco's Motion to Suppress Physical Evidence (Doc. No. 34) and Supplemental Motion to Suppress Physical Evidence (Doc. No. 75), all supporting and opposing documentation submitted, and the hearings held before the Court on January 14, 2002, January 28, 2002, and February 6, 2002, **IT IS HEREBY ORDERED** that said Motions are **DENIED**.

BY THE COURT:

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John R. Padova, J.